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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000555-001 DT 11/21/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
H. Beal
Deputy

STATE OF ARIZONA

GARY L SHUPE

v.

ROY VERNON ZUMSTEIN (001)

LESLIE ANN HAACKE

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 2010–9011737.**

Defendant-Appellant Roy Zumstein (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Suppress, which alleged the officer did not have reasonable suspicion to stop his vehicle, and abused its discretion in denying his motion to strike two potential jurors. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

Defendant was charged with driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2), alleged to have been committed on July 18, 2009. Prior to trial, Defendant filed a Motion To Suppress that alleged the officer did not have reasonable suspicion to stop his vehicle.

At the hearing on Defendant's motion, Officer Vincent Atwell testified he was seated on his motorcycle on July 18, 2009, just after midnight, on the east side of 56th Street approximately ¼ mile north of the 101 Freeway, monitoring traffic using a radar unit. (R.T. of Feb. 8, 2010, at 3, 4, 6.) At this point 56th has three northbound lanes and three southbound lanes, and the speed limit was 35 m.p.h. (*Id*. at 3, 22.) When he would obtain the speed of a vehicle exceeding the speed limit, he would place the radar unit in a holder attached to the right side crash bar, start his motorcycle, and proceed after the vehicle. (*Id*. at 7–8.) He saw a vehicle northbound in the curb lane that appeared to be exceeding the speed limit, so he used the radar unit, which gave a speed of 53 m.p.h. (*Id*. at 9–11.) At this time, there were other vehicles on 56th Street, but this was the only vehicle going north. (*Id*. at 21.) As he put the radar unit in the holder, the vehicle passed him. (*Id*. at 13.) He described the vehicle as a 2003 BMW four-door sedan. (*Id*. at 21.) He started

his motorcycle and pulled out and behind the vehicle, and followed it as it moved from the curb lane into the middle lane into the left through lane and into the left turn lane, whereupon it turned left into a shopping center. (*Id*. at 13–14.) During this time, he maintained a continual visual observation of the vehicle from the time he first saw it traveling north until he stopped it, except for the time he put the radar unit in the holder and started the motorcycle, and when he looked south before driving into the roadway. (*Id*. at 14, 22–23.) Officer Atwell turned on his emergency lights and the vehicle stopped, and Officer Atwell then approached the driver, whom he identified as Defendant. (*Id*. at 17.)

Diane Russo testified she was a neighbor of Defendant's and was riding with him and his wife that night. (R.T. of Feb. 8, 2010, at 24–25.) She said they turned onto 56th Street from Bell Road, and they moved out of the curb lane before reaching Mayo Boulevard, which is south of the 101 Freeway, and that there were two northbound lanes north of the 101 Freeway. (*Id*. at 26–27, 30.) She said there was a lot of traffic moving north at the same time as they were. (*Id*. at 27–28.) She said Defendant's vehicle was never in the curb lane once it was north of the 101 Freeway. (*Id*. at 31.)

Leslie Ann Haacke testified she was Defendant's wife and was an attorney, and was riding with Defendant when he was stopped. (R.T. of Feb. 8, 2010, at 35–36.) She said 56th Street has three lanes under the 101 Freeway, and they were in the middle lane. (*Id*. at 38.) She said they were never in the curb lane north of the 101 Freeway. (*Id*. at 38–39.) She said there were other vehicles traveling north in that vicinity, and that they moved to the left and into the left turn lane and turned into City North (*Id*. at 39.)

Officer Atwell then testified on rebuttal. (R.T. of Feb. 8, 2010, at 40.) He reiterated Defendant's vehicle was the only vehicle traveling north at the time, and there were no other vehicles between him and Defendant's vehicle. (*Id*. at 40–41.) He further said there were no other BMWs on the road at that time. (*Id*. at 41.)

After testimony, Defendant's attorney argued Officer Atwell may have seen a vehicle exceeding the speed limit, but it was not Defendant's vehicle, and thus Officer Atwell stopped the wrong vehicle. (R.T. of Feb. 8, 2010, at 46–47.) The prosecutor argued the vehicle Officer Atwell saw exceeding the speed limit was a BMW, Defendant's vehicle, and thus he did not make a mistake. (*Id*. at 47, 49.) The prosecutor further argued that, even if the vehicle Officer Atwell stopped was not the vehicle he saw speeding, Officer Atwell believed the vehicle he stopped was the vehicle he saw speeding, thus he had a reasonable suspicion to stop that vehicle. (*Id*. at 47.) The trial court then rules as follows:

> THE COURT: . . . You know, Ms. Ferraro [Defendant's attorney], I've got to give you credit. You had me thinking. Even if—even if Officer Atwell pulled over the wrong guy, you've still got a reasonable basis to stop. Motion is denied.

(*Id*. at 50.)

For jury selection, the trial court started with 24 prospective jurors. (R.T. of Nov. 23, 2010, at 56–65.) Juror #3 (Mr. Parsons) made some additional comments, and the trial court questioned him. (*Id*. at 57–59, 71–72, 78–79.) He said there was nothing that would affect his ability to be fair and impartial. (*Id*. at 72, 79.) Later, the trial court and Defendant's attorney questioned him. (*Id*. at 89–96.) In response to Defendant's attorney's question whether anything about his past experiences would interfere with his ability to be fair and impartial, he said, "I hope not." (*Id*. at 93.) He said he could set aside what he had discussed with other jurors at a previous trial and decide the facts of this case based on the evidence presented in this case. (*Id*. at 95.)

Juror #5 (Ms. Nelson) made some additional comments, and the trial court questioned her. (R.T. of Nov. 23, 2010, at 59, 73–74.) She said there was nothing that would affect her ability to be fair and impartial. (*Id*. at 74.) Later, the trial court questioned her, and she said she could make a decision in this case based only on the evidence presented and the law the trial court gave. (*Id*. at 98, 100.) Defendant's attorney also questioned her. (*Id*. at 100–01.)

Juror #6 (Mr. Brown) made some additional comments, and the trial court questioned him. (R.T. of Nov. 23, 2010, at 59–60, 73–74.) He said there was nothing that would affect his ability to be fair and impartial. (*Id*. at 74.) Later, the trial court questioned him, and he said he could make a decision in this case based only on the evidence presented and the law the trial court gave, and could be fair and impartial to both sides. (*Id*. at 102–03, 106, 107, 108.) Defendant's attorney also questioned him, and he said he would have no concerns with a person such as himself sitting on the jury. (*Id*. at 108–09.)

Juror #10 (Ms. Johnson) made some additional comments, and the trial court questioned her. (R.T. of Nov. 23, 2010, at 61.) Later, the trial court questioned her, and she said she could make a decision in this case based only on what was presented here and could be fair and impartial to both sides. (*Id*. at 113–16.) Defendant's attorney also questioned her, and she said she could set aside her previous knowledge gained from literature and make her decision based on what was presented here. (*Id*. at 117–18.) In response to other questions, she said she could be very impartial. (*Id*. at 119.) She did say that, with all her experiences, Defendant would be concerned with having her on the jury. (*Id*. at 119–20.)

After the questioning of the jurors, Defendant's attorney made motions to strike juror #5 (Ms. Nelson) and #10 (Ms. Johnson) for cause. (R.T. of Nov. 23, 2010, at 129, 131.) The trial court denied both of Defendant's motion to strike, saying the information they gave might be useful for Defendant's attorney to use in determining whether to use a peremptory strike. (*Id*. at 131, 132.) Defendant's attorney did not make any further motions to strike, nor did she make any claim that, by using peremptory strikes on juror #5 and juror #10, she would have no further peremptory strikes, and that she wanted to remove any other jurors. (*Id*. at 133.) After the parties exercised their peremptory strikes, juror #5 (Ms. Nelson) and juror #10 (Ms. Johnson) were no longer on the panel. (*Id*. at 134.)

The trial court then began with the presentation of evidence, which included testimony that the phlebotomist drew Defendant's blood. (R.T. of Nov. 23, 2010, at 148, 214, 220.) The results of testing Defendant's blood sample showed he had a BAC of 0.0978 and 0.0974. (R.T. of Nov. 24, 2010, at 229, 235.) At the close of the State's case, Defendant made a motion for judgment of acquittal, which the trial court denied. (*Id*. at 310.) After arguments and instructions, Mr. Parsons was selected as the alternate. (*Id*. at 437.) After deliberations, the jurors found Defendant guilty of both counts. (*Id*. at 440–41.)

The trial court later imposed sentence. (R.T. of Dec. 17, 2010, at 444–46.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court abuse its discretion in finding the officer had reasonable suspicion to stop Defendant's vehicle.*

Defendant contends the trial court abused its discretion in finding the officer had reasonable suspicion to stop his vehicle. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). A police officer has reasonable suspicion to detain a person if there are articulable facts for the officer to suspect the person is involved in criminal activity or the commission of a traffic offense. *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985). The commission of a traffic violation provides sufficient grounds to stop a vehicle. *State v. Orendain*, 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (Ct. App. 1996); *State v. Acosta*, 166 Ariz. 254, 257, 801 P.2d 489, 492 (Ct. App. 1990), *quoting United States v. Garcia*, 897 F.2d 1413, 1419 (7th Cir. 1990). In the present case, Officer Atwell testified the vehicle was traveling 53 m.p.h. in a 35 m.p.h. zone. Officer Atwell thus had the legal authority to stop the vehicle he clocked.

Defendant contends, however, his vehicle was not the vehicle Officer Atwell clocked. Officer Atwell testified (1) there was no other traffic going north at that time, (2) he saw the vehicle was a BMW as it passed him, (3) he kept the vehicle in his sight from when he first saw it until he stopped it, except for looking down to put the radar unit in its holder and start the motorcycle, and to look south before pulling gout into the street. Defendant's witnesses testified Defendant's vehicle could not have been the vehicle Officer Atwell clocked because Defendant's vehicle was in the middle lane and not the curb lane, as Officer Atwell testified. This conflict in testimony raised a factual issue the trial court resolved by finding Defendant's vehicle was the one Officer Atwell clocked:

> THE COURT: . . . You know, Ms. Ferraro [Defendant's attorney], I've got to give you credit. You had me thinking. Even if—even if Officer Atwell pulled over the wrong guy, you've still got a reasonable basis to stop. Motion is denied.

(R.T. of Feb. 8, 2010, at 50.) Although the trial court did not specifically state Defendant's vehicle was the one Officer Atwell clocked, this Court concludes that is what the trial court meant. Thus, Officer Atwell had the legal authority to stop Defendant's vehicle.

Defendant contends the trial court instead found Officer Atwell stopped the wrong vehicle, but under the facts of this case he still had the legal authority to do so. This Court concludes the trial court was merely stating hypothetically that Officer Atwell would have had the legal authority under the facts presented even if he had stopped the wrong vehicle. But even if the trial court's only ruling was that Officer Atwell would have had the legal authority even if he had stopped the wrong vehicle, this Court concludes trial court would have been correct in that ruling. The applicable Arizona statute provides as follows:

> C. The trial court shall not suppress evidence that is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation.

A.R.S. § 13–3925(C). By stating "even if Officer Atwell pulled over the wrong guy, you've still got a reasonable basis to stop," the trial court determined pulling over the wrong vehicle would be considered a good faith mistake. Thus, the trial court was correct in not suppressing the evidence.

B. *Did the trial court abuse its discretion in denying Defendant's motion to strike two of the prospective jurors.*

Defendant contends the trial court abused its discretion in denying Defendant's motion to strike prospective juror #5 and juror #10. In reviewing a trial court's determination whether to strike a juror for cause, because the trial court is the one who sees and hears the prospective jurors, the inquiry itself is more important than the rigid application of any particular language, thus an appellate court must pay deference to the trial court and review the trial court's determination for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 4 P.3d 345, ¶ 24 (2000). Both juror #5 and juror #10 said they could be fair and impartial and decide the case only on the evidence presented. This Court therefore concludes the trial court did not abuse its discretion in refusing to strike juror #5 and juror #10.

Moreover, if a trial court refuses to strike a juror for cause and the defendant uses a peremptory strike to remove that juror, the defendant is not entitled to automatic reversal; in order to obtain a reversal on appeal, the defendant is required to make a showing of prejudice, which requires showing the resulting jury was not fair and impartial. *State v. Kuhs,* 223 Ariz. 376, 224 P.3d 192, ¶¶ 26–27 (2010) (defendant contended trial court erred in not striking juror for cause; because defendant then struck that juror, and because defendant made no showing jurors who

decided case were not fair and impartial, no prejudicial error); *State v. Martinez*, 218 Ariz. 421, 189 P.3d 348, ¶ 35 (2008) (defendant contended he was improperly forced to use peremptory strike to strike juror whom trial court should have struck for cause; because juror in question was not seated and defendant made no claim any jurors who decided his case should have been struck for cause, defendant failed to show he was entitled to any relief); *State v. Garza*, 216 Ariz. 56, 163 P.3d 1006, ¶ 32 (2007) (defendant contended trial court should have struck for cause nine jurors against whom he had to use peremptory strikes; because defendant failed to demonstrate jurors who were eventually impaneled were not fair and impartial, defendant failed to establish error). In the present case, Defendant has made no showing the jurors who decided his case were not fair and impartial, thus Defendant has failed to show any prejudicial error.

Defendant contends, however, he was prejudiced because, if he had not been forced to use his peremptory strikes on juror #5 and juror #10, he would have had the "opportunity to use those strikes to remove these other Jurors Nos. 3 and 6 that he also felt might not be fair and impartial." Defendant's argument fails for four reasons. First, the record does not support his contention he used his peremptory strikes to remove juror #5 and juror #10. It is the duty of counsel who raises an issue on appeal to see the appellate record contains the material to which counsel takes exception, and when matters are not included in the record on appeal, the reviewing court will presume the missing portions of the record supported the action of the trial court. *State v. Zuck*, 134 Ariz. 509, 512–13, 658 P.2d 162, 165–66 (1982). In the present case, Defendant has not provided this Court with the list showing which party struck which prospective juror. Thus, this Court has no way of determining from the record who struck juror #5 and juror #10.

Second, absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). In the present case, Defendant never made any claim with the trial court that its refusal to strike juror #5 and juror #10 for cause would force Defendant to use his peremptory strikes on them, thus he is entitled to relief on this issue only if he can show fundamental error. Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). As noted above, because Defendant has made no claim that the jurors who did decide this case were not fair and impartial, Defendant has failed to show prejudice.

Third, Defendant is essentially arguing the automatic reversal rule the court rejected in *State v. Hickman*, 205 Ariz. 192, 68 P.3d 418, ¶ 6 (2003). This Court has no authority to change the result reached in *Hickman*. *McKay v. Industrial Comm'n*, 103 Ariz. 191, 193, 438 P.2d 757, 759 (1968) ("Whether prior decisions of the highest court in the state are to be disaffirmed is a question for the court which makes the decision.").

And fourth, Arizona has already rejected the identical argument Defendant makes:

> Although we find Eddington's motion to strike should have been granted, the trial court's ruling is nevertheless subject to harmless error review. The state argues the error was harmless because Eddington was ultimately tried by a fair and impartial jury. We agree.
>
> Eddington contends he was prejudiced because his use of a peremptory strike on the [prospective juror who was a sheriff's deputy] prevented him from striking a juror who worked as an engineer for Raytheon and had rendered a guilty verdict in another case. Although these details may have made this juror less appealing to Eddington, they in no way suggest the juror was biased or could not serve as a fair and impartial trier of fact. Because Eddington has not articulated beyond mere speculation how the trial court's error affected the outcome of the case, we find the error harmless.

*State v. Eddington*, 226 Ariz. 72, 244 P.3d 76, ¶¶ 18–19 (Ct. App. 2010) (court held trial court should have struck for cause prospective juror who was sheriff's deputy and was employed by same sheriff's department that investigated case). Defendant contends he would have used his peremptory strikes on juror #3 and juror #6 if he had not been forced to use his peremptory strikes on juror #5 and juror #10. Juror #3 was selected as the alternate, thus Defendant has failed to show any prejudice from the trial court's decision not to remove juror #3 for cause. That leaves only juror #6. During voir dire, Defendant never made any claim juror #6 could not be fair and impartial. To paraphrase *Eddington*, "Although these details may have made [juror #6] less appealing to [Defendant], they in no way suggest [juror #6] was biased or could not serve as a fair and impartial trier of fact." Because Defendant has not articulated beyond mere speculation how the trial court's actions affected the outcome of the case, Defendant has failed to show error.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not err in denying his Motion To Suppress, and further concludes the trial court did not abuse its discretion in denying his motion to strike two potential jurors.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Phoenix Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

*/s/ Crane McClennen*
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT